United States District Court

Southern District of California

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Case No. 10-CR-4246 JM
BASAALY SAEED MOALIN, MOHAMED MOHAMED MOHAMUD, ISSA DOREH, AHMED NASIR TAALIL MOHAMUD, Defendants.	)	Status Hearing Thursday, February 9, 2012

Before the Honorable Jeffrey T. Miller
United States District Judge

Official Interpreter: Maryam Abdi, Court Interpreter

Official Court Reporter: Debra M. Henson, CSR, RPR
U.S. Courthouse
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Record produced by stenographic reporter

Appearances

For the Government:	Laura E. Duffy UNITED STATES ATTORNEY William P. Cole Caroline P. Han ASSISTANT U.S. ATTORNEYS 880 Front Street, Suite 6293 San Diego, CA 92101
For the Defendants:	
(Mr. Moalin)	Joshua L. Dratel, Esq. Alice L. Fontier, Esq. OFFICE OF JOSHUA L. DRATEL 2 Wall Street, Third Floor New York, NY 10005
(Mr. M. Mohamud)	Linda Moreno, Esq. LINDA MORENO, P.A. P.O. Box 10985 Tampa, FL 33679
(Mr. Doreh)	Ahmed Ghappour, Esq. LAW OFFICES OF AHMED GHAPPOUR P.O. Box 20367 Seattle, WA 98102
(Mr. A. Mohamud)	Thomas A. Durkin, Esq. DURKIN & ROBERTS 2446 N. Clark Street Chicago, IL 60614

San Diego, California - Thursday, February 9, 2012

Defendant A. Mohamud is being assisted by a Somali interpreter.)

THE CLERK: Calling matter 1 on calendar, 10-CR-4246, USA versus Basaaly Saeed Moalin, Mohamed Mohamed Mohamud, Issa Doreh, Ahmed Nasir Taalil Mohamud, for a motion hearing.

THE COURT: Good morning, counsel. Would you like to state your appearances, please.

MR. COLE: Yes, your Honor. Thank you. William Cole and Caroline Han for the United States.

THE COURT: Thank you.

MR. DRATEL: Good morning, your Honor. Joshua Dratel with Alice Fontier for Mr. Moalin.

MS. FONTIER: Good morning, your Honor.

THE COURT: Good morning.

MR. DURKIN: Good morning, Judge. Tom Durkin on behalf of Ahmed Nasir Mohamud, who's in custody and being brought into the courtroom now.

MS. MORENO: Good morning, your Honor. I'm sorry. I have --

THE COURT: I'm sorry, Ms. Moreno. It might be difficult -- why don't you remain seated, and we can bring a microphone over to you to make it a little bit more comfortable for you.

MS. MORENO: Thank you so much, your Honor.

THE COURT: You're welcome.

MS. MORENO: Linda Moreno on behalf of Mr. Mohamed Mohamud, who's present in Court in custody.

MR. GHAPPOUR: Good morning, your Honor. Ahmed Ghappour on behalf of Issa Doreh, who is present in court.

THE COURT: Good morning. Okay. I think that's everyone. Good morning, gentlemen. All the defendants are here. And this is the time we have set for a further motion hearing. We have several matters to take up today, and the government has made a motion for a CIPA Section 2 pretrial conference; and in addition to that, we have -- we have several substantive motions and other motions filed by the various defendants that we can address today as well.

With respect to the government's motion for a pretrial conference pursuant to Section 2 of CIPA, Mr. Cole, did you have anything further to add to that, sir?

MR. COLE: Your Honor, at this time I think the conference, to the extent we have it, would be pretty minor and limited. Essentially what I wanted to alert the parties to and the Court is that the government does intend to submit some information to the Court under Section 4 of CIPA for the Court's consideration ex parte. There may be a small volume of classified discovery in this case to give to the defense. That question is not yet settled and I don't think will be

settled for at least a few more weeks until the Court can consider a Section 4 motion, but I just wanted to note the issue for the parties and the Court now, mainly just flag it because with the trial date of May 7, in the event classified discovery is provided to the defense, there would need to be a Section 5 notice from the defense if they intend to use the information at trial within 30 days of the trial date, no later than 30 days of the trial date, which would be about April 6 or 7.

I don't think there's really much else to discuss right now, and because the potential volume even -- I think there well may not be any classified discovery ultimately, but potential volume, if there is, is going to be very low, I think a handful of items. And so I just wanted to sort of paint that general landscape for the Court and the parties.

THE COURT: What are you intending on submitting to the Court for -- I mean in terms of the volume of material, the task of the Court under Section 4, what are you contemplating at this point?

MR. COLE: The Section 4 material for the Court I think will be also very limited, and -- I think it will be less than 50 pages, briefing and items, perhaps substantially less than that. The large bulk of information -- the larger volume of information that will be submitted to the Court will be in relation to the response to the FISA suppression

motion; that's really where the volume of just pages is is in response to the FISA suppression. The Section 4 filing relating to discovery will be very, very small. And we currently anticipate having both those filings to the Court on or about February 17, in other words, the response to the FISA suppression motion and the Section 4 filing.

THE COURT: Has anything gone over to the defense yet?

MR. COLE: Anything --

THE COURT: Any classified information gone over to the defense yet?

MR. COLE: No. And under Section 3 of CIPA, before that could happen, we'll have to have a protective order and a few minor details worked out with the Court.

THE COURT: Have you broached the subject of a protective order with the defense; has that discussion even begun?

MR. COLE: It hasn't only because I am still not certain as I stand there that there even be will --

THE COURT: I sorry. I missed --

MR. COLE: I'm sorry. It hasn't because I'm not certain as I stand here that we actually will have to provide classified discovery. It could be that items just simply will be -- the information will be available in unclassified format or we will determine that it's not needed to be turned

over in discovery at all. And so -- but I think the filing with the Court on the 17th will further the resolution of those questions, and so I haven't broached the subject, although the protective order is a statutory requirement under CIPA and it's standard, and these counsel are all experienced in those matters, so I don't think the terms of the order itself will be any issue.

THE COURT: Are there security clearances for all counsel?

MR. DRATEL: Your Honor, if I may? Yes, all counsel are cleared. Obviously there are just administrative issues with respect to a particular case which the -- Classified Information Security Officer's I think what they call them now -- would have to do administrative filing to get us cleared for this particular case. But we all do have active clearances that would be available in this case.

MR. COLE: And I was going to say, your Honor, that the Court -- the CISO is present today, Mr. Slade, and he is aware of these four counsel and has already been -- well, I shouldn't speak for him, but I believe that issue is in good hands and underway to the extent that we do need to turn over classified discovery.

THE COURT: Okay.

MR. DRATEL: Your Honor, may I speak to some of the other issues that Mr. Cole addressed with respect to Section

4 and to the FISA?

THE COURT: Yeah. I'm just trying to get a preliminary handle on this right now; I'm trying to establish a framework for --

MR. DRATEL: That's what I'd like to speak to.

THE COURT: -- and you'll certainly have an opportunity. I have few more questions --

MR. DRATEL: Oh, certainly.

THE COURT: -- for Mr. Cole first. Mr. Cole, this date of February 17 that you've indicated the material will be ready, is that a firm date by you?

MR. COLE: I believe it is a firm date. I have -- I had anticipated in our motion response in a footnote anticipating the 13th, and I was off by --

THE COURT: I saw that, and that's why I'm asking.

MR. COLE: Yeah, I was off by a week. There's -- we are -- we have received -- there's -- this is not -- this is my problem, not the Court's, so I'm not trying to make it sound like it's outside my control -- but there are a lot of moving parts with various components in Washington to get these filings ready and cleared and on their path, and I believe that everything is in line with a solid deadline of the 17th and that we will be able to make that date. I have every expectation that's going to happen. I plan on that.

THE COURT: Are you going to remain -- with your

new responsibilities and all, are you going to continue to remain on this case as counsel of record --

MR. COLE: I am.

THE COURT: -- with Ms. Han?

MR. COLE: This is -- yes. It's the only case I'm doing that on, but yes, I am.

THE COURT: Okay. Okay. Have there been any discussions between -- and I'm not talking about discussions to resolve here -- have there been any discussions between the two sides through counsel relative to discovery or any other preliminaries that I should be made aware of at this point before we proceed further? Mr. Cole, you can answer that, or anyone.

MR. COLE: Well, I -- I don't think so, I mean nothing -- I can't think of any discussion I've had with counsel -- well, I did have a discussion just this morning with counsel that they want -- an issue that they wanted to raise, not with respect to discovery necessarily but with respect to the dates set in this case. But I think that --

THE COURT: You're talking about the trial date of May 7?

MR. COLE: Yes. But I think I'd refer to counsel to state their position on that because it's --

THE COURT: Yeah, we'll get to all of these issues, but it sounds like what they're --

MR. COLE: Counsel advised me that they -- well, some counsel, at least a couple of the attorneys advised me that they may want to move the trial back, and that was something we just discussed briefly before court this morning. And our position is to keep the trial date where it is, but we haven't a lot of chance to hear -- this was a very brief conversation, and I'm not foreclosing hearing the position and perhaps taking their position myself, but right now our position is that the trial date should hold.

THE COURT: Okay. All right. Anything else, Mr. Cole, before I hear from the defense?

MR. COLE: Other than the issues raised in the motions, I don't think there's anything that we've discussed with counsel that needs to be raised right now.

THE COURT: All right. Very good. Okay.

MR. DRATEL: Your Honor, just first talk about just -- the Court's last question about conversations about discovery -- and I'm not suggesting Mr. Cole didn't raise this, but I think there was a conversation yesterday that he had about we've received some material, and we -- as the Court knows, we've moved for Brady material both in terms of discovery letter and in terms of motions. The government I think has said that we'll be getting some additional materials such as some grand jury material, and I don't know whether that -- whether they classify that as Brady or if

it's being produced under some other -- some other rubric, but we did raise with the government yesterday some issues with respect to particular people and particular information that we had about potential Brady, and I think the government was going to look into that and get back to us. So we don't know that that's -- I didn't want to suggest that it's all resolved because this may be something we might come back to the Court on at a later date if what -- if our information doesn't match what the government tells us is its information, but I obviously want to give the government the opportunity to review its materials and produce what it -- what it feels it's obligated to produce --

THE COURT: Let me --

MR. DRATEL: -- before we join that issue.

THE COURT: Let me stop you there for just a moment. So you're suggesting that you've made a request for certain Brady material -- and you seem to be pretty specific with respect to that -- that request being made of the government. You've also made a request, general request for Brady; obviously all of you have in your papers. Are you suggesting that you're requesting something of the government specifically that does not fall within the general requests you've made in your papers?

MR. DRATEL: Yes. It's material that we have -- it's specific -- it's about a specific person who we learned

about since the time that we filed the motions, and, in fact, that we got significantly more information much more recently about, so that we would be able to present to the government a bit more specificity about what we thought it was. So it's not covered -- the stuff that we put in the motion we're prepared to argue today because I think we've joined those issues and the government's presented its position. This is another issue that rather than raise with the Court to resolve today, we just wanted -- we thought it would be better to run through the ordinary process that would give the government the opportunity to fulfill its obligations to the extent it thought necessary, and then if we thought that that was insufficient, then we'd raise it with the Court. But I think it's just premature right now to raise it with the Court.

THE COURT: Mr. Cole?

MR. COLE: It's just one specific grand -- they asked for one specific grand jury transcript yesterday, and yesterday we weren't sure who they were talking about or the name. This morning I got information that identified exactly who they were talking about, and I told them that we'd have no trouble reviewing that specific transcript and turning it over if it's discoverable, and --

THE COURT: Is this Jencks?

MR. COLE: -- we could do that right away.

THE COURT: Is it Jencks or something other than Jencks?

MR. COLE: No, it's certainly not Jencks, so it would only be -- the only way it could be discoverable is if it's Brady, and so we're going to go back and look at it with that eye, and -- but it's one short transcript, and we could easily have an answer to them very quickly on that.

THE COURT: Okay. With respect to the intercepts, all of those early materials -- and I know it's been a while since we've discussed that particular subject -- is everything resolved, provided, with respect to those, that class of discovery?

MR. COLE: Yes, with the exception of Jencks. So one thing that we -- as the case develops and as we identify witnesses, it is the case that we will have to, you know, reconsider, to some extent, whether there are additional audio intercepts available to the government that may qualify as Jencks or impeachment, which -- for example, for a witness that we never even anticipated having available until recently -- and so we do plan to turn over -- we do plan to turn over some additional intercepts that are not intercepts we would use in our case-in-chief or not affirmative evidence but just out of an abundance of caution in case somebody could view them as impeachment or Jencks.

THE COURT: Okay. All right. Anything else? I'm

going to get to the matter of the trial date toward the end of this morning's hearing. I'd like to cover other matters before we start talking about what the future may portend. Anything else on discovery or the matters raised by Mr. Cole thus far --

MR. DRATEL: Yes, your Honor.

THE COURT: -- Mr. Dratel?

MR. DRATEL: On the last matter, well, we'll defer that when we hear from the government more in terms of the Jencks issue with the witness they talked about, but this is the first we're hearing of that, and I have a sense -- let me not jump the gun. I'll just go to the other issue, which is the classified filings, separate them into two categories, one is Section 4 and one is the FISA response.

Traditionally, while the statute does not require it, traditionally and I think invariably, I think it's safe to say, the government has always filed its Section 4 material ex parte. The statute permits the Court to disclose to the defense in its discretion. We obviously would like to see the Section 4 filing so that we could respond to it in a meaningful way. And there are different tiers. One is obviously the factual information, which is the most important in terms of the relevance, but then there are also legal arguments as well as to why it's not discoverable or what they're asking the Court to review. Some of these

in-camera reviews are also for the Court to determine whether the information is Brady, and so that's another issue. And so we would -- and we can file this in writing if the Court wishes in terms of our position with respect to sort of the different tiers, if one is getting the entire file, including the factual part, or at least getting the legal submissions so that we can have a context in which to respond.

Also, which has become traditional in the context of these cases, is that in order to assist the Court in making a determination that it is fair and consistent with the legal standards for Brady and exculpatory material, that we would be permitted ex parte to essentially have an audience with the Court to alert the Court or give the Court an outline of why we would think certain material would be Brady, in other words, the types of material that we're looking for, theories of defense, particular factual issues that could assist the Court; if the Court is going to review the material in-camera and we are not going to have access to it, that the Court would be able to then have a context in which to determine Brady. I think without that, it would be almost impossible for the Court to accurately or at least in a comprehensive way to make a determination as to what would be exculpatory or not, what would qualify as Brady. So that, again, has become traditional in these cases to give the defense an opportunity to do that, and we would very much

like to avail ourselves of that opportunity before the Court were to make a decision on the Section 4 filings.

With respect to FISA, the FISA, again, invariably, and the government has in every FISA situation filed something that is ex parte; whether it's all ex parte or partial ex parte is different in different cases. I think in most cases nothing is disclosed to the defense with respect to the FISA response.

Obviously, again, there's a tiered response. One is to say that whatever affidavits and factual information are of course extremely relevant because these are very fact-specific and case-specific determinations, that we would want to see that. But also the legal argument, again, is one that is obviously something that it would be -- it hamstrings the reply obviously in a fundamental way if we don't have an opportunity to see what the government's arguing. I know just generally but that obviously this is a case with its own set of facts and circumstances. Again, also because of the way that the FISA process has evolved -- and, again, it's the Court's discretion as to whether to disclose to the defense the underlying affidavits and applications, to assist the Court, and also for due process purposes, there are two separate sections; but I think -- that are in our papers, so -- because we anticipated that obviously this issue was going to arise.

But, in addition, to the extent that we don't get an opportunity to hash this out in a way that we get access, that, again, we would like the opportunity with the Court to apprise the Court of what we would be looking for in the context of the defense information, again, to the extent necessary, in an ex-parte manner so that the Court would be aware of what to look for if we don't get an opportunity to look at it ourselves. And that's what we're -- that's the opportunity we're looking for in that context. Again, you know, obviously we think that in terms of the language of the statute, to assist the Court in the accurate determination we think about the --

THE COURT: Well, you have pages and pages of assistance, proposed assistance, in your papers indicating what your -- in your opinion the Court should be looking for, and I think you've done a very thorough job of touching all the bases. But I assume that this particular request you're making now is more specific and fact-oriented?

MR. DRATEL: Yes, and also based on the continued investigation and evolution of the information that we have been able to gather, not necessarily about the FISA itself but about the case that we think is useful as well.

THE COURT: Thank you. Yes, Mr. Durkin?

MR. DURKIN: Judge, there was one minor discovery issue I had meant to raise with the government this

morning --

THE COURT: Sure.

MR. DURKIN: -- and we got talking about other things. I believe there had been some discussion about transcripts being made of the videotaped statements of clients, and I don't recall getting it; I was wondering about the status of that.

MR. COLE: Okay. Yes. Mr. Durkin's referring to an issue I think has been raised at every hearing we've had, which is whether there will be turned over to the defense a transcript of his own client's post-arrest statement, and the answer is yes. It just hasn't been a top priority for us. This is an English-language post-arrest recorded statement that he's had the recording of since basically the initiation of this case and which can be transcribed by him if he really wants one. We do have a transcript. We're editing it. We'll give it to him soon, but it certainly hasn't been on top of our list because it's not a discovery obligation, and we've had lots of other obligations we've been trying to meet. But we will provide him with a transcript as a courtesy, and we will do that within -- I think within a couple weeks. We're just doing final edits to it.

MR. DURKIN: That's fine. I'm not -- I wasn't complaining, I was just --

MR. COLE: No, I understand. I just want to -- I

just wanted to let the Court know that we're not trying to ignore the request, we just have to kind of prioritize --

THE COURT: Well, this is the kind of thing I think you can discuss between yourselves and -- because it seems that there's been a pretty significant amount of cooperation up to this point in time, so I think that's the kind of thing that can be handled between counsel outside the context of the courtroom. But if anything arises, if there's any kind of an issue, just don't hesitate to let me know. Okay. Was there anything else anyone had? Ms. Moreno, Mr. Ghappour, anything else on discovery before we move to another subject?

MS. MORENO: No, your Honor. I actually had spoken with counsel --

THE COURT: Mr. Moreno, why don't you just remain seated and that way you're closer to the microphone and --

MS. MORENO: I'm stronger than I sound, your Honor.

THE COURT: Okay. I'm glad to hear that.

MS. MORENO: I appreciate the Court's -- I appreciate the Court's sensitivity. So I had spoken with Mr. Cole this morning about this particular transcript, and I trust Mr. Cole that he will look into it and provide it accordingly, so that's all.

THE COURT: Okay. Thank you. Mr. Ghappour?

MR. GHAPPOUR: No, your Honor.

THE COURT: All right. Very good. Thank you.

Okay. Does that -- have we touched upon the discovery matters that we need to discuss? Mr. Cole, anything further that you might -- that might come to mind relative to any of the provisions you've made or supplements other than what you've already addressed today?

MR. COLE: No. I mean certainly I think as a standard in most cases as trial approaches, we will turn over additional Jencks and impeachment on witnesses that are -- that are perhaps cooperating with the government or otherwise we wouldn't want to disclose or put in harm's way prior to getting a little closer to trial, especially now that apparently there's going to be request to continue the trial. But other than minor things like that that I think are common in every case, we don't have any major discovery issues to discuss.

THE COURT: All right. There should be a cutoff data for what the government is going to provide for trial purposes --

MR. COLE: Sure.

THE COURT: -- whether it be Jencks or whether it be other material, so that the defense has an opportunity to consider the material and prepare for trial. So I'll certainly take your -- I have a cutoff point in mind myself, but I'd be happy to hear what the suggestions of the parties are. Okay. Very good. All right.

We can get to some of the substantive motions if counsel wish to do that. There haven't too many substantive motions that need to be addressed. I've been through the papers, and when it comes to the substantive motions, I do understand we're on two separate tracks here; we're on the -- we've got the FISA track, which I think counsel have already acknowledged is a separate track, and we'll have to set up a schedule for that; but we also have the other motions as well, motion to suppress evidence and the motion to suppress statements brought by Mr. Moalin. So if there's no objection, I propose at this point we move into some of those substantive motions.

I've been -- as I say, I've been through the papers. I don't think it's necessary for you to repeat what you have in the papers. If there's anything you'd like to highlight or underscore, I'm happy to hear you. It appears that with respect to these two substantive motions, there's no need for an evidentiary hearing because the facts really aren't in dispute, at least the factual underpinnings for the motions themselves. So this involves you, Mr. Dratel. Would you like to proceed?

MR. DRATEL: Yes. Ms. Fontier is going to argue the suppression motion --

THE COURT: All right.

MR. DRATEL: -- but I just want to add one thing

about the FISA and Section 4, which just so as not to be misunderstood, when I'm talking about disclosure to defense counsel, I'm talking about in the context of a -- it can remain classified, it can be discovered by the appropriate protective order; I'm not talking about the dissemination wider than counsel. So I didn't want to sort of let that sit out there that that was a possibility. We understand what the nature of the information in terms of its -- whether it's classified or simply in camera or sealed or however it's categorized, we would be obviously amenable to that.

THE COURT: Okay. All right. Thank you. All right. Ms. Fontier, would you like to proceed with the motion? Why don't we take these motions one at a time. We have a motion to suppress evidence, that is, taken from the residence, then you have the motion to suppress the statement or statements made at the airport.

MS. FONTIER: Yes, your Honor, and --

THE COURT: Would you like to use the microphone there. It might be easier for you. You can -- I know it would be easier for the court reporter and easier for those who are seated in the back to hear what you have to say.

MS. FONTIER: Your Honor, given that I am fully aware that you will read all papers, I'll be very brief. As to the motion to suppress the evidence seized from Mr. Moalin's home, I just want to highlight this very unique

factual scenario that occurred here.

Mr. Moalin was actively under investigation in 2007 and 2008. That investigation included the FISA wiretap warrant and also physical surveillance of him, his home, all in 2008. That investigation concluded at the end of 2008. The FISA wiretap was shut down, the surveillance was no longer being conducted, and -- I won't speak to their modes or methods or even their motivation, but I do think that it's worth pointing out that the San Diego Field Intelligence Group issued an assessment of Mr. Moalin in which they determined that he was not idealogically supporting al-Shabaab. All of that occurred at the end of 2008, beginning of 2009.

THE COURT: Well, was that really the finding though, that he was not ideologically supporting al-Shabaab or was it -- was it more that a primary motivating factor may have been tribal in nature or reasons other than ideologically supporting al-Shabaab? I didn't see anything, at least in the papers submitted thus far, indicating that the sole motivation was -- was clan-based motivation.

MS. FONTIER: Your Honor, what -- the information that we have -- and, again, Mr. Dratel will address the --

THE COURT: I know you don't have all of it. I know that's a discovery issue.

MS. FONTIER: -- as related to this, but FBI

report, which summarizes the -- I'm just going to call them FIG for the Field Intelligence Group -- the San Diego FIG assessment, which was done on April 23 of 2009, and this is, I quote, although Moalin has previously expressed support for al-Shabaab, he is likely more attentive to Ayr sub fed issues and is not ideologically driven to support al-Shabaab.

Your Honor, as it applies to the search warrant, I just -- I bring this up because the government determined at some point that Mr. Moalin was not ideologically driven to support al-Shabaab and essentially all the investigation was concluded; the wiretaps stopped, the physical surveillance stopped. All of this ended at the end of 2008, and the application for the search warrant includes facts only from what was taken from the investigation in 2008. So there is, you know, discussion about the surveillance and about his general habits and where he lived and where -- that he came and went from his house and that the documents in other items that they sought were likely to be in his house because his habits in 2008 indicated that they would be in his home.

THE COURT: Does motivation trump knowledge and intent in this context? Let me give you a hypothetical, and let's assume that there's an individual who is -- feels an affinity, a connection with Zawahiri and begins to contribute money to Zawahiri, not because Zawahiri is at the top of the al-Qaeda chain but he's a doctor and they like to support

Doctors Without Borders and he might be healing people in the mountain regions between Pakistan and Afghanistan. Would that be -- would that be enough to in a sense trump the knowledge and intent of supporting a foreign terrorist organization?

MS. FONTIER: Your Honor, the question --

THE COURT: I know this is -- it's a hypothetical that's a little far out there.

MS. FONTIER: It is a hypothetical, and the question of his motivation, why he was supporting or who he was supporting certainly is evidence of what the intent was, and the intent and the knowledge are certainly elements of the criminality. But in the context of this search warrant -- and, again, I think the government conflated this in their papers -- we didn't raise the question of whether there was probable cause to arrest Mr. Moalin. The probable cause that's necessary for the search is the determination -- again, the actual language is that there has to be facts sufficient to justify a conclusion that the property which is the object of the search is probably on the premises to be searched at the time the warrant is issued. So that's the actual question of probable cause as it relates to the search.

The question of his motivation, his intent, his knowledge all goes to the probable cause for his arrest or to

his eventual, you know, whether -- the question of whether he is guilty of the offense, all which will be addressed in far too much detail I'm sure in the course of time. But as it relates to this motion, that question is not an issue. It really is just whether or not there was sufficient facts to justify the search of Mr. Moalin's house on November 1st, 2010 based on information that was garnered through an investigation that was shut down in 2008.

THE COURT: Well, you brought up the subject of motivation though. I agree with your last statement, but it was you who brought up the subject of motivation. I'm just asking you does motivation trump knowledge and intent. You know, if that's conflation of the issues, then I guess that's your response. But to the extent that you were bringing that up as some kind of a mitigating factor, and I was asking you does knowledge and intent -- isn't it really knowledge and intent that goes into the probable cause formula or analysis.

MS. FONTIER: Well, your Honor, the reason I brought it up is just to highlight the fact that this investigation stopped, and there was I believe a reason that this investigation stopped, and that was the independent assessment of FIG.

THE COURT: Okay.

MS. FONTIER: That is the reason that I brought it up --

THE COURT: Okay.

MS. FONTIER: -- and not to address the greater issues of motivation versus knowledge and intent.

THE COURT: Okay. And perhaps the hypothetical I used was an unfortunate hypothetical in this respect, that I know you all are very sensitive to the reference to al-Qaeda in the operative indictment, and you've made a motion to strike any of that, which I think the government does not oppose, and so there's no -- that -- that motion will be granted, and any reference I think to al-Qaeda would be unfortunate in this case, assuming this case goes forward to trial. So you should -- I think you should be -- any concerns you have about the mention of that group should be allayed.

MS. FONTIER: And I appreciate that, your Honor, and -- but, again, what I'm focusing on here, it's actually a very narrow issue. The question is is the information that was garnered through an investigation in 2007 and 2008 that was shut down sufficient to create the probable cause to believe that the evidence that they sought through the search warrant was on the premises where Mr. Moalin lived in November of 2010. As we set forth in our papers, we believe that it is not.

There is an intervening fact which is I think critical and fatal to the probable cause, and that is that

all of -- Mr. Moalin moved in May of 2010, so the premises that was searched, the home that was searched in November of 2010, he had only lived in since May, and any of the facts -- May of 2010 -- so all of the facts in the application relate to a different house. There's absolutely no connection to the house that was searched and the information that is in the search warrant application.

THE COURT: So what -- what conclusion am I to draw from the fact that this gentleman changed his residence? Am I to conclude that it would have been more probable, assuming he kept books, records of donations and so on and so forth on individuals, am I to assume that simply because someone is moving from one location to another location, they're going to destroy all of that stuff, it will no longer remain in existence? Or should I assume that it's reasonable, as set forth in the affidavit supporting the application for a search warrant, that those are the kinds of materials that are going to be retained if the individual is going to continue with his interests in supporting individuals mentioned in the papers?

MS. FONTIER: Your Honor, respectfully I think that your question is your answer. I don't think you should assume anything, and that is exactly what the government has asked you to do. They want you to assume that because there was evidence in 2008, because he was under surveillance in

2008, because he made some transactions in 2008, you should assume that he was still doing that in 2010 and find probable cause. But there is nothing to support that assumption. There's nothing that says, you know, we were -- Mr. Moalin was under surveillance; when he moved, he emptied his apartment and took everything with him; Mr. Moalin continues to behave in these manners in 2010; Mr. Moalin continues to do these things in 2010. There's none of that in here. And to assume anything thwarts probable cause completely. There's no facts. And so I am asking you to assume nothing.

THE COURT: Aren't there indications, however, that -- at least in the record -- that Mr. Moalin was going to remain active in his fundraising capacity into the future?

MS. FONTIER: In 2008, that -- the last facts in this search warrant application --

THE COURT: Into the future.

MS. FONTIER: -- are in 2008. It is assumed that he may support other people. But, again -- and part of the reason that I brought up the FIG assessment is that their own assessment of him was that he wasn't. So it's false, and it's also, as I pointed out in the reply, it doesn't go to the question of whether or not there was probable cause at the time of this search to believe documents and evidence they sought were in the premises that they were going to search.

THE COURT: Okay.

MS. FONTIER: If you have no further questions, I don't have anything further on that issue.

THE COURT: Okay. But I'd like to give you a bit of time to respond to Mr. Cole's statement or Ms. Han's statement, her argument, if they're going to argue this point. I'll give you -- it's your motion; you should have an opportunity to --

MS. FONTIER: Thank you, your Honor. And just so your Honor knows, I'm not intending to argue any further than what's in the papers the statement issue.

THE COURT: You're not going to argue that --

MS. FONTIER: No.

THE COURT: -- issue? Okay. Fine. Good. Ms. Han, please.

MS. HAN: Your Honor, as is clear from the papers, the defendant's main contention with probable cause in the search warrant are a couple of issues: First, the FIG assessment, as Ms. Fontier just made clear, and second, the connection between the home and the records that were sought.

Your Honor, addressing that FIG assessment specifically, I'd just like to read the context in which the sentence that Ms. Fontier read about that FIG assessment.

THE COURT: May I break in for just a moment before you begin --

MS. HAN: Yes, your Honor.

THE COURT: -- reading from the FIG assessment? As I went through the papers, I was a little unclear as to whether or not the FIG -- it doesn't seem that the FIG material, or at least the FIG material that the defense is requesting, is Section 4 material. Am I incorrect in that assumption? Mr. Cole?

MR. COLE: There's confusion. Because this document refers to an earlier document by date, they're assuming there's more information they're entitled to. This document extracts from an earlier document the discoverable information. So, in other words, if -- the earlier document does not contain any additional discoverable information that's not -- was not put into the format we produced it in. And --

THE COURT: I'm not talking about discoverable information --

MR. COLE: Right.

THE COURT: -- I'm talking about the defense is making broad-based requests for any underlying information --

MR. COLE: Oh, I'm sorry.

THE COURT: -- that might have ultimately gone into the FIG assessment. You've got the FIG assessment. They want any statements that may have been utilized in the group reaching its conclusions, et cetera, et cetera. Is that

Section 4 material or --

MR. COLE: No.

THE COURT: -- is that -- that's --

MR. COLE: It's the --

THE COURT: -- regular discovery.

MR. COLE: -- audio intercepts. It's the audio intercepts. I mean the FIG assessment is an opinion by an analyst; that's what it is.

THE COURT: Are your saying they have --

MR. COLE: Yes --

THE COURT: -- everything?

MR. COLE: -- they have -- they have the audio, and they can draw their own opinion as to Mr. Moalin's motivations, just the way somebody listening to the calls drew an opinion here.

THE COURT: All right. The way the papers framed it, I was under the impression that there were other written materials out there from which the ultimate assessment was drawn. But that is not the case, so that in a sense moots the defense request for discovery.

MR. DRATEL: I don't know. I would like to argue that, your Honor, just based on what I think is --

THE COURT: All right. Okay. That's another issue. And that's something that falls into the realm of discovery, so, Ms. Han, pardon the interruption. You were

about to respond to Ms. Fontier by reading a portion of the assessment.

MS. HAN: Your Honor, Ms. Fontier made much of this assessment, saying essentially that this assessment stopped the investigation of Mr. Moalin, and it's actually completely inaccurate. And in light of the information that's in this assessment, it would -- it's certainly information that would have sparked a greater, perhaps wider investigation. Specifically, the report says the San Diego FIG assessment is that Moalin, who belongs to the Hawiye tribe/Habr Gedir clan/Ayr subclan, is the most significant al-Shabaab fundraiser in the San Diego area of operations. And then the report goes on to say that Mr. Moalin had previously expressed support for al-Shabaab, and then goes on to say that he might have been otherwise ideologic -- or might have been otherwise influenced by these clan affiliations.

But based on that conversation -- on that particular text and the information that's in the FIG assessment, it's not the kind of information at all that would stop this investigation, and it's -- does not draw any negative light of any of the information that is actually in the search warrant application.

And, your Honor, in that search warrant affidavit, as you've reviewed that search warrant affidavit -- I'll just go over it briefly -- the search warrant affidavit discusses

the extensive nature of the fundraising that Mr. Moalin was doing. In addition, it talks about his list of donors that he had and also, in particular, that he had a contact book that was so important to him that when he traveled internationally, he asked somebody to keep it for him because he did not want to be found with that particular item.

In addition, your Honor, it describes Agent Kaiser's training and experience that the kinds of records that were being sought are the kinds of records that would be kept by someone like Mr. Moalin specifically because, based on the information in the search warrant application, it was clear that these records were so important to him.

In addition, your Honor, in terms of connection between the home and the records, again, that goes to the point of the nature of the records that were being sought. The nature of the records that were being sought were lists of donors, hawala records, the kinds of things that would be maintained.

Moreover, your Honor, should the Court find that Magistrate Adler's finding of probable cause was in fact clearly erroneous, the good faith exception does apply in this case because the agents did rely on that search warrant in an objectively reasonable manner. Moreover -- and there was a colorable argument for probable cause as set forth in the search warrant. So with that we would submit.

THE COURT: So the -- the suggestion -- there was a suggestion by the defense that the investigation of Mr. Moalin had stopped at some point. Of course, the defense is urging that the reason for that was a finding or conclusion in the field group or Field Intelligence Group assessment.

They also suggest that the only reason why the investigation restarted -- their parlance or their characterization -- or lighted up was because of the investigation into the Shidaal Express, that but for the investigation into the Shidaal Express, the investigation into Mr. Moalin never would have resumed. Do you have any response to that?

MS. HAN: Your Honor, I guess it's -- essentially what you're asking the United States to speak to is essentially what happened between April of 2009 and October of 2010 when the defendants were arrested; is that essentially what you're asking?

Your Honor, during that time period, as you're aware, there are a number of intercepts, and they required Somali translations, and there's was a great number -- there's a great amount of work to be done during that time period to get this case ready to the point at which the defendants could be arrested. So that is my response about what was occurring during that time period.

THE COURT: Okay.

MR. COLE: And, your Honor, I know that two counsel shouldn't be speaking on the same issue, so if you want me to wait -- I don't want to stand up while Ms. Han's on the podium, but I was with the case from 2008 all the way and so -- and so that's why I'm standing up now. And I can tell you that the notion that this FIG assessment had anything to do with the investigation of this case starting or stopping is completely based in no reality. This investigation never stopped; it never stopped until the time that this defendant was charged, and it was not restarted ever by the Shidaal Express investigation at all. In fact, as Ms. Han pointed out, to be able to get a case like this to the point where we could comply with discovery obligations and be in any place and ability to move an investigation like this into the prosecution stage, especially because of the high volume of Somali intercepts, we had a lot of work to do before we could bring it public. But the FIG assessment was not even on the radar screen as an issue in that time line.

THE COURT: Okay. Thank you, Mr. Cole. Thank you, Ms. Han. Ms. Fontier, anything further?

MS. FONTIER: Your Honor, I just very briefly want to point out that, again, each of the facts that Ms. Han has alluded to occurred in 2008. They are telling you that the investigation was open, and by that they interpret that as translating intercepts. But there's nothing in the search

warrant affidavit that relates to 2010, and because of that it is stale, there was a lack of probable cause, and it's really not even a colorable argument, so the good faith exception would not apply.

THE COURT: Okay. Very good. All right. I will take this motion under submission, that is, Mr. Moalin's motion to suppress evidence. You've indicated, Ms. Fontier, that you have no desire to argue at this point the motion to suppress statements, you're going to rely on what's in the papers?

MS. FONTIER: That's correct, your Honor. I would submit on the papers on that. Mr. Dratel does further want to address the specific Brady request that we've made in our papers.

THE COURT: Well, we'll get to that. All right. Did the government want to argue the matter of the motion to suppress? Ms. Han?

MS. HAN: No, your Honor. We would also submit on our papers.

THE COURT: Okay. Then I will take that matter under submission at this time. Okay. Mr. Dratel, the --

MR. DRATEL: Yes.

THE COURT: -- this is the motion for exculpatory evidence now, Brady?

MR. DRATEL: Yes, your Honor. And I'm not going to

rehash what's in the papers, but I do want to address the Court's question that you posed to Ms. Fontier on the -- on the question of motivation, intent, and knowledge because I think it does relate to the relevance of the material that we're talking about here.

One of the complexities in this case is that the government has charged four different statutes, and we'll leave aside money laundering for a moment because obviously that requires the predicate of the underlying criminal conduct that's charged in the other statute. But you have 2339 (a), which is material support for a -- in this case alleged a conspiracy overseas to -- a conspiracy to kill, maim overseas; you have 2339 (b), which is material support to a foreign terrorist organization, a designated entity; the third is the -- an underlying 956 (a) conspiracy, which is a conspiracy to murder and maim overseas.

With respect to 2339 (b), the material support to a foreign terrorist organization, motivation is certainly not an element, and the knowing or intentional provision of material support, regardless of motivation, if it's done with knowledge and intent that it's to a foreign terrorist organization, is a violation of the statute. So in that context motivation is certainly less important. Motivation obviously casts light on intent, and also motivation can be, in some ways, a manifestation of intent in this context.

If -- and to take the Court's -- to take the Court's hypothetical, which is that if you were to give material support -- if a person were to give material support to a member of a designated group -- and in the case that the Court, Edwari (phonetic) -- and Edwari (phonetic) is himself designated, so perhaps it's not the best example -- but let's say if it's someone who's not designated himself but is someone who's part of a designated group -- if you are giving money to -- for the purpose of that person's personal activities as opposed to the organizational context, it would not be a violation of 2339 (b); there are cases to that effect. But if it's obviously in the organizational context, even if it's for a purpose that might not be considered terroristic in the sense that for food or humanitarian assistance or something like that, the way that 2339 (b) is structured and the way that the designation system is structured, that that's indivisible, the organization's activities are indivisible. So even if it's for a social service arm of an organization -- let's say like a Hezbollah or something -- that has different categories, military, social, political -- even if it wasn't to the military or for a terrorist purpose specifically, going to the organization itself is deemed to be sort of the fungibility of money or resources, that it frees up other resources for terrorist activity. So in that context anything that's given with

knowledge and intent to an -- in an organizational capacity is a violation of the statute regardless of the motivation, even if the motivation is somewhat purer than that.

For 2339 (a) it's very different. That's to provide a -- material support to a conspiracy that is designed to harm. So, therefore, you have to have the specific intent in 2339 (a) -- and again, the case law supports this -- that 2339 doesn't require a specific intent to do something with respect to violence. So, for example, so giving material support for the purpose of medical treatment or for the purpose of humanitarian aid would not be a violation of 2339 (a). Therefore, motivation is critical in that statute.

For the 956 conspiracy, same thing in the sense that if you are not -- if your agreement is not about committing violence but is instead about some other form of assistance that you're providing, it would not be a violation of 956 (a) if you did not have a -- an intention -- when I say intention, it really encompasses motivation in that context -- an intention to -- to participate in a conspiracy to commit violence.

So those are three different statutes with, in some ways, very different elements in the context of the Court's question. So I think that complicates it, but my point in the context of the Brady is that even if the motivation were

not directly relevant for 2339 (b), it is certainly directly relevant for 2339 (a) and the 956 charges. So in that context what we're asking for is certainly relevant. And the government did put in its papers that any assertion that this FIG assessment is based solely on intercepts, and reading it that was not apparent to me. I don't know if the government's taking that position categorically, but the government has just taken the position with the Court this morning that the intercepts weren't even prepared as of April 2009 when the initial assessment was made that's referenced in this later FIG report, the later FIG assessment.

So I think that the Court at the very least should order the government to provide whatever foundational material goes to the exculpatory parts of this document that are not intercepts. If they're intercepts, then we have them, obviously we have them. But I believe that the way this document reads is that there's more to it than just intercepts, and to that extent I think the Court should order the government to provide it, to review its files to make sure that it's provided it. Even if the government is under the impression at this stage, two or three years down the road, that that's what it's based on, I think there at least be a review and order that other material that forms the foundation for this. And, you know, it's in our papers as to

what the law is on this in the sense that the government can't just say "by the way, we have information that's exculpatory" without providing the basis or the foundation for it and puts it in a usable format for the defense; they can't just say there's a witness who did identify your client or --

THE COURT: Well, I don't think the government would take issue with that. I think if Mr. Cole, for example, were to rethink exactly what went into the FIG assessment and all of a sudden remembered no, wait a minute, there were some other materials, that that would be provided to you. I have that -- I have that impression. But let me let Mr. Cole speak to that, and he may want to speak to the issue that you've suggested, that based on what he says, there were no transcriptions completed until '09 and that nothing had been transcribed before that.

MR. DRATEL: I don't want to say nothing, but that the transcription process was such a long one that by April of '09, they could not have had a full picture just from interceptions alone.

THE COURT: All right. Mr. Cole, should something come up, should there be additional foundational material for the assessment, I assume you have no objection to providing those to the defense.

MR. COLE: No, I don't have any objection provided

they are -- that the foundational material itself is in fact discoverable. In other words, I'm not aware of any foundational material for this other than the audio intercepts, and we've gone back and checked. And so if there is any foundational information, I'll need to -- if I find any other foundational information, I would need to look at it, is it classified, I'd have to talk to the Court maybe. I'm not trying to be coy here at all because I'm not aware of any, but as soon as something like that comes to my mind, either it will turned over or you'll be hearing about it from us ex parte if necessary.

THE COURT: Okay. Well, I think that's fair.

MR. COLE: Right.

THE COURT: I think what you're saying right now is even though you think you've provided everything to the defense without CIPA concerns, and perhaps even out of an overabundance of caution, believing yourself that it goes beyond Brady, what you seem to be saying is that whatever additional materials might exist, you're going to at least submit to the Court --

MR. COLE: Yes.

THE COURT: -- for an in-camera review if in fact you think it's -- CIPA may be implicated. What if -- what if there are -- there are just other statements of individuals or other reports, notes --

MR. COLE: Sure.

THE COURT: -- those kinds of things, not classified; would you be providing that to the defense?

MR. COLE: Yes. If there is a basis for this, that this individual who makes this assessment or the FIG who makes the assessment, if they were drawing on something other than what I believe they were drawing on or what we understand they were drawing on --

THE COURT: Okay.

MR. COLE: -- then that's not a problem, your Honor.

THE COURT: Okay.

MR. COLE: And I do want to just -- I think I've already referenced this point and made it clear, but just in case I didn't, so all the parties and the Court understand, the reason this document's dated 6-15-2011 is this was simply the document prepared so we could provide discoverable information. It's simply -- the reason it refers back to a -- it's sort of like, as we often do, if we get information in a particular format, and that format may involve lots of information that isn't discoverable, we will send a letter to the defense about the part that is discoverable. This was essentially that. This was a document prepared specifically for discovery so we could parse out from a larger collection of information what's actually relevant and discoverable

here, which is why it's referring back to the April 2009 document. Does that make sense?

THE COURT: Yes.

MR. COLE: Thank you.

THE COURT: All right. Thank you. Mr. Dratel --

MR. DRATEL: Yes.

THE COURT: -- anything further?

MR. DRATEL: Your Honor, just two things. One is with respect to that April 23, 2009 initial assessment that this later FIG assessment is based on, this is redacted itself. I don't see why we couldn't get a redacted version of that that had the material. I don't know to what extent this is summarized. I would certainly ask at a minimum that the Court be provided that document to look in camera as to whether or not this document satisfactorily or sufficiently captures what we're talking about in terms of Brady material what's in the original document.

Second thing is that I think the Court's question earlier to I guess Ms. Han or Mr. Cole in the context of the argument that Ms. Fontier was making I think foreshadows something when you asked about Section 4 is that obviously intelligence assessments are, to some extent, in a traditional sense incorporate a lot of information, some of which would be classified, some of which is not, so obviously I appreciate the Court's attention to that, which I think you

covered here in the sense that some of that may be something that will be provided to the Court in camera, again, in the context of hopefully we'll have an opportunity to at least provide the Court with our sort of sense of what we'd be looking for very specifically.

THE COURT: Okay. All right. Thank you. I think that covers the motions brought by Mr. Moalin. And why don't we get to the motions brought by Mr. Doreh. Is that a correct pronunciation of Mr. Doreh's name, Mr. Ghappour?

MR. GHAPPOUR: Your Honor, I believe it's "door-ra" (phonetic).

THE COURT: Mr. Doreh. Thank you. I appreciate that. Okay. Mr. Ghappour, you've -- you can certainly use the lectern there. You've moved for a bill of particulars. I've been through that. Anything further there?

MR. GHAPPOUR: No, your Honor. The government's opposition addressed several of the particulars sought, so I'd just like to address a few of those that are outstanding. Specifically, first, there's no way really to tell whether or not the indictment references one, two, three, or four conspiracies to violate 18 USC Section 956, and that is the conspiracy to kill persons in a foreign country. Count 3 charges a conspiracy to kill persons in a -- sorry. Count 3 charges a conspiracy to kill persons in a foreign country in violation of Section 956. It delineates overt acts, and

we're satisfied with that.

Similarly, Counts 1 and 4 charge conspiracies in violation of different statutes, but both in preparation for and in carrying out violations of Section 956.

Count 5 charges a substantive violation, a violation of material support statute 2339 (a), and that is the provision of material support to terrorism in preparation for and carrying out a conspiracy to kill persons in a foreign country, again, in violation of Section 956.

As it stands, there is no way to tell whether the conspiracies referenced in Counts 1, 2, and 5 -- sorry -- Counts 1, 4, and 5, all reference that conspiracy delineated in Count 3, and Mr. Doreh's entitled to know whether the government views these conspiracies alleged to be one encompassing conspiracy or several separate and distinct conspiracies. This goes to the core of our ability to defend the case, avoids surprise, and plead double jeopardy down the line.

So the same is true with respect to the conspiracies referenced in Counts 2 and 4. Count 2 is a 2339 (b) charge, conspiracy to provide material support to a foreign terrorist organization. And similarly, Count 4 is a conspiracy to launder monies, and that is for preparation and carrying out a 2339 (b) conspiracy. That's a defect that we can't get our head around.

Second point is the particularization with respect to the identity of the victims or the class of victims for Counts 1, 3, 4, and 5. All of these reference a conspiracy to kill in a foreign country. However, the conspiracy to kill in a foreign country is basically an agreement to commit an offense overseas that if performed within the jurisdiction of the United States would constitute murder. And just as murder has defenses that turn on the identity of a victim, so would the Section 956 violation.

And, your Honor, I don't want you to lose sight of the nature in this case in making this consideration, specifically that the indictment and discovery indicate that there's been activity in this case in Somalia and several parts of the United States. Based on what we know so far about the case, witnesses could be anywhere from the Horn of Africa to St. Louis. So our ability to investigate and I think that -- I think the international scope of this case should have a particularly important bearing on that.

Third, your Honor, is particularization with respect to the manner in which the transactions in Counts 1, 4, and 5 were to be used in -- in order to carry out a conspiracy to kill persons in a foreign country. Put in contest -- put in context, in contrast to Count 1 -- I mean Count 2 -- Count 2 would be satisfied if a defendant sent money to al-Shabaab instructing them to buy marshmallows.

Very simple. It's material support to a foreign terrorist organization. However, the conduct that would otherwise -- that otherwise innocuous conduct would not satisfy Counts 1, 4, or 5. So the question is was the money that was sent, how was it intended to be used to kill persons in a foreign country, and that is not answered in the discovery or the indictment.

Alternatively, is the government alleging a global jihadist theory, in which case we can contend that. Are they alleging that any money provided to any jihadist constitutes a promotion of a conspiracy to kill in a foreign country? Because there are defenses against that as well. And, your Honor, that's all I've got.

THE COURT: All right. Thank you, Mr. Ghappour. Mr. Cole?

MR. COLE: Thank you, your Honor. Sort of similar to a drug case, your Honor, you have a conspiracy to import narcotics and you have money laundering, which is -- the predicate act is importation of narcotics. There is one conspiracy to kill overseas. It simply alleges a predicate in other offenses in the indictment. And so if that's the question ultimately at bottom, that Mr. Doreh wanted to address through the motion for a bill of particulars, that is not a hard one to answer. I don't think it requires any particulars.

The conspiracy to kill is alleged in the indictment, and it simply alleges a predicate offense in the other charges that require predicate offenses. We're not suggesting there were four separate, different, distinct conspiracies to kill. And so I think that's -- that addresses one question.

I don't know what was meant by a global jihadist theory. I'm just not familiar with that issue, but I will say that the theory of the case is simply that these defendants conspired to send money to Somalia so that it could be used to kill people, and that's the theory. We don't have a detail either to put on a trial, it's not part of our case at trial, or need be alleged in the indictment exactly how the money was used ultimately or even how someone who received the money would in fact intend to use it. The whole focus of our case is going to be on the intent of these four defendants here in the United States; what did they intend when they sent the money over? And our -- our theory of the case, as alleged in the indictment, is that they intended that the money would be used to kill overseas. And so that's why the government resists a bill of particulars asking for details of how the money precisely was used, how it precisely was going to be used because none of those things are required to prove this case at trial, and so they shouldn't be required to be detailed.

Although we are going to show money transfers took place, we don't have to. The money transfers are evidence of the conspiracy. There is not even any requirement that we show a money transfer ever occurred in terms of the elements, and a bill of particulars should address the elements and nature of the offense, not the evidence we're going to use to prove it. So that's why we resist a bill of particulars that would artificially require the government to explain how it's going to prove its case; that is already alleged fairly simply and straightforward in the indictment.

Also, although we know that -- we're not trying to be hypertechnical in relying on the timeliness of the motion -- that would be silly -- but it is -- it is not helpful to the government to receive a bill of particulars when the grand jury that returned the indictment is long gone. If it was received at a time where there was actually a valid reason to address something in the indictment, it would have left up to us the option to supersede to address issues, so now --

THE COURT: This raises the timeliness --

MR. COLE: Yes.

THE COURT: -- issue?

MR. COLE: And it would have allowed us that. Now here we are not far from the trial date after a very long period of litigation, and the government just submits that

there really isn't a lot of question what this case is about. It's actual quite simple in terms of theory. I'm not saying it'll be simple in terms of proof; that of course is for the trial to find out and for the jury to find out. But in terms of theory, it's simply that these individuals wanted to send money to people and organizations in Somalia knowing and intending that the money would be used to kill other people. And we are not alleging the specific -- that there was only one specific person intended to be killed; it was being sent to the organization for the purpose of killing, and that's the theory. And so we don't think a bill of particulars is required, and we think the case law that we cited in our papers indicates that what Mr. Doreh is really requesting is proof, not a bill of particulars.

THE COURT: All right. Thank you, Mr. Cole. All right. The other motion that was filed by Mr. Doreh was a motion for leave to file further motions; I don't think we need to address that.

Let's get to Mr. Mohamud's motions that need to be addressed. There's the -- there's the Brady motion; I think we've already been over that. And then there's the motion to strike the surplusage --

MS. MORENO: Your Honor, I --

THE COURT: Yes?

MS. MORENO: Let me savor the victory for a moment.

THE COURT: I'm sorry?

MS. MORENO: Let me savor the victory.

THE COURT: On the motion to strike?

MS. MORENO: Yes, your Honor --

THE COURT: Okay.

MS. MORENO: -- if I may. As a defense lawyer, I don't --

THE COURT: Well, you don't want to snap defeat out of the jaws of victory.

MR. COLE: I want to try.

MS. MORENO: Perhaps I should just submit and sit down, your Honor.

THE COURT: No, no, please.

MS. MORENO: No, your Honor. Thank you. I'm mindful of the Court's previous comments with respect to this particular sentence, and as the Court may or may not have been considering, the government did drop a footnote in its discussion of the particular issue of al-Qaeda and Zawahiri and whatever other issues they want to bring up that we believe are not only completely irrelevant but highly prejudicial. And if the government proceeds on its intention as it says it might, then we will address those in a motion in limine at the appropriate -- excuse me -- at the appropriate time.

THE COURT: Well, that would always be a

consideration of the Court going forward. And I certainly accept Mr. Cole's statement in the spirit in which he's made the statement, or the statement of nonopposition, so I wouldn't be concerned about that at this point. All right?

MS. MORENO: Thank you, your Honor. I would submit on the other.

THE COURT: Thank you. I think the other motions can be submitted as well.

MS. MORENO: Thank you.

THE COURT: And then we have the motions brought by Mr. Durkin's client.

MR. COLE: Your Honor?

THE COURT: Yes?

MR. COLE: I'm sorry. Could I just make -- just make sure that Ms. Han and I tracking and we're all on the same page with the Court. We agreed to striking that out of the indictment. We don't need it in there. It isn't an element of the offense. And we also would never venture to insert the name "al-Qaeda" into a trial without the Court having a chance to rule upon that ahead of time, but I just wasn't sure if we heard an earlier comment by the Court to mean that you'd already decided that there couldn't be, if -- before we had a chance to explain why, that there couldn't be any reference necessarily to al-Qaeda in the trial. And I just -- I just want to say that we would -- we would bring

that pretrial or pre-putting on any evidence, but -- we don't have a big plan about making this case about al-Qaeda at all, but the point we want to preserve for future briefing to the Court and to the parties is Mr. Ayrow was -- he was a rock star, if you will, of jihadists in the Horn of Africa, and part of his image, his persona, his well-known background, was training in Afghanistan, being connected to al-Qaeda, harboring individuals wanted for embassy bombings, that sort of information. The defense may dispute that, but that is -- that is part of what we see and what we would potentially prove at trial was part of his well-known persona and background and reputation. And the reason we want to at least preserve a chance to address this to the Court is because, as the defense has pointed out, we have a lot we have to show as to intent, and if it is the case that Mr. Ayrow was famous for these things, then we would argue that it is relevant to intent when somebody decides to send Mr. Ayrow money as to what it's going to be used for. And so we just want to hopefully preserve for future briefing and decision by the Court when references to al-Qaeda would or would not be appropriate. We agree that it doesn't need to be in the indictment, that that language should be struck that's in that part of the indictment. But that's all. I just wanted to flag that because we heard earlier a comment that might have suggested that the Court had already decided

that there would be no reference.

THE COURT: Well, it may well be that this needs to be looked at again, and I certainly take your statement at face value, Mr. Cole, that you're not going to make any references, for example, before the jury panel or in papers that would be available to the jury, whether it's a reading of the indictment or otherwise, without the Court having cleared any references based upon a bonafide and reasonable showing from the government that any reference to al-Qaeda or any other hot-button group or movement or subject, for that matter -- let's not define it just to groups -- could be addressed by the Court ahead of time.

MS. MORENO: And just, your Honor, more for clarification purposes --

THE COURT: Yes.

MS. MORENO: Of course, as I've indicated, we would have strenuous objections to al-Qaeda being anywhere in this trial, but if that is going to be an issue that the Court will allow in some context, we would need to know that obviously before jury selection because that would be a very important --

THE COURT: Oh, absolutely. But we're -- yeah, that train has not pulled out of the station yet. We're still -- with respect to proceeding to trial and sanitizing what might need to be sanitized and alerting jurors to what

might be in the evidence to make sure with that knowledge they can still fairly consider all of that in connection with all the evidence in the case, those are issues that will be discussed before jury selection but at about that time, at about that point in time. So I wouldn't -- as Mr. Cole indicated, he has flagged the issue, I know everyone is concerned about it, and if we need to address it, we certainly will before it's brought out in any form or fashion before either a jury panel or the actual jury to be selected for this case.

MS. MORENO: Thank you, your Honor.

THE COURT: Okay. Thank you, Ms. Moreno. All right. Okay. Then, Mr. Durkin, we have your client's motions. You have early return of trial subpoenas being requested in a one-sentence motion. You're not really specifying any issue here. Anything further you wanted to say on that, sir?

MR. DURKIN: Judge, only that I'm used to filing that in Chicago all the time. I've filed it everywhere else and never had --

THE REPORTER: Mr. Durkin, I'm sorry. I can't hear you.

MR. DURKIN: I said I'm used to filing that motion routinely in Chicago and have filed it other places. Perhaps things are different here, but I have never had the

government oppose that motion as long as it was mutual, so I don't understand the issue. I think their references to Nixon is out of a different context. I don't think it would be appropriate for me to have to say I want to subpoena eeny, meeny, miney, moe, but if they're going to get access to the materials, I don't know how they can be heard to complain.

THE COURT: All right. Mr. Cole or Ms. Han?

MR. COLE: Your Honor, I don't think we have a real huge opposition here. It was just simply, like you said, it was a one-sentence motion, and I don't know what it really means or what this -- I don't even know what the subpoenas are obviously; I don't think we have a right to know that. That's something that we'll address with the Court, what Rule 17 subpoenas should or should not be issued. We were just simply trying to point out what we understood to be the legal standard for that, and if we're wrong on legal standard, we're wrong, but -- I don't think we are, but I assume he'll have no trouble justifying his Rule 17 subpoenas to the Court, and if the Court thinks it's appropriate, they'll be given early return. So I don't think we really have much of a role in that.

THE COURT: No, I don't think so. I just see that as a nonissue at this point. Okay. Thank you. There was a motion for preservation of notes as well. You're moving to produce all rough notes prepared by law-enforcement-related

personnel, including prosecution witness interview notes. And obviously the government has an obligation to produce Brady and Jencks material, but I think your request at this point, Mr. Durkin, may be a little broad. Did you want to address that? It seems to go beyond Brady and Jencks.

MR. DURKIN: Well, it's --

THE COURT: I'm assume you're not requesting anything over and above Brady and Jencks.

MR. DURKIN: I'm -- I'm not, but what I'm asking -- and, again, maybe this is because I'm more accustomed to the way it works in Chicago -- but it seems to me preservation is a rather simple act. I'm not asking for production. And what I don't want to have happen is have some unforeseeable issue come up that turns into an impeachment issue or some type of credibility question at trial and find out that there -- that the only real source of the explanation could have been the agents' notes but they were gone. I don't know how anybody's harmed here. I just don't understand the government's reticence. I'm not asking for anything to be produced that I'm not entitled to.

THE COURT: Okay. Mr. Cole, anything you'd like to add?

MR. COLE: No, I don't think there's really any reticence to preserve what I guess the core request is, which is to preserve notes of witness interviews. The government

just gets concerned when the request is stated so broadly, it makes it sound like I have to preserve my Post-It note when I jot down a note about your Court's ruling today or I have to preserve -- I mean it was asking for preservation of any note by any prosecutor or agent working the case. And I don't think that's what's really desired by Mr. Durkin, but when it's expressed that broadly, I don't want to say we're going to comply, I want to tell the Court --

THE COURT: It is broad. The reference to law-enforcement-related personnel is very broad; I think it's broader than what I've seen in the past. But this is not an issue we need to spend any time on. I understand what your request is, Mr. Durkin. I'll respond to it. Okay.

We have a motion for adequate notice of any 404 (b) evidence. That's more in the nature of a motion in limine. The government's indicating that it will produce any such evidence no later than 30 days before trial is; is that correct, Mr. Cole?

MR. COLE: Yes, your Honor.

THE COURT: Okay. I think that's -- I think that's reasonable. Mr. Durkin, did you want to be --

MR. DURKIN: I'll stand on the pleadings, Judge.

THE COURT: Okay. And a motion for a more immediate disclosure of favorable evidence. Well, I think the government is committed to timely complying with all of

its discovery obligations. I'll be setting further dates, compliance dates, Mr. Durkin, either at the end of this hearing today or at a future hearing. I realize that there may be a request to move the trial date a bit, so I think that that would probably have a bearing on dates. But I think you can rest assured that the Court will set reasonable dates for providing additional material, whether it's -- whether it's Jencks or Brady or Giglio or other materials. Okay?

MR. DURKIN: That's fair.

THE COURT: Okay. Very good. And then there's a motion for hearing concerning co-conspirator statements; you're looking for a pretrial hearing on admissibility of co-conspirator statements. Anything further on that motion, Mr. Durkin?

MR. DURKIN: Well, only this, Judge. It's -- I haven't -- I haven't had a hearing on a co-conspirator statement in about 35 years, which -- I hate to admit I've been practicing even longer.

THE COURT: Even in Chicago?

MR. DURKIN: Even in Chicago. And -- however, it is -- and this may be unique to the Seventh Circuit in a case called Santiago -- but it's -- the government routinely provides a written proffer under that theory of law, and I think it's consistent with the Ninth Circuit. I'm very

concerned here about where my client fits in this case.

My client is involved in a $3,000 transfer, pure and simple. He is the low man on the totem pole, and he's way down the pole. And for him to have to -- you know, the issue of his membership in this particular conspiracy is going to be highly contested. And to admit all of those statements conditionally is a recipe for disaster I think, and I just do not understand how even the Court would want to run that risk. I mean it's -- I don't think it's an onerous burden on the government at some point, you know, 30 days before trial or a reasonable period before trial, to simply give you a proffer of that evidence. I just think it's very dangerous, and I did raise the issue of my client's right to counsel of his choosing. I mean I'd like to tell you we were making millions off of this, but that would be a considerable stretch. My client will not have the resources to have a second trial if there's a mistrial, and I think that's a serious issue.

THE COURT: All right. Thank you, sir. Mr. Cole, do you wish to be heard, or Ms. Han, on this particular matter?

MR. COLE: Well, your Honor, the only things I'd add on this issue are Mr. Durkin in his papers referred to a Supreme Court case, Bourjaily, suggesting that the case somehow trumped or overturned Ninth Circuit precedence in

this area, and I just want to point out that that's not the case. In that case, the Supreme Court expressly noted that it expressed -- it did not express any opinion about the proper or approved trial court's involvement in this area of the law, and that's at note 1 in that Supreme Court case, clearly saying that it wasn't addressed when it issued an order approving. Instead, the Ninth Circuit has a long history and tradition in its precedent of allowing the Court to do this during the trial itself and in fact has expressly stated that it will not adopt the James approach from the Fifth Circuit and the few circuits that have adopted it. And so the Ninth Circuit leaves this very much in the Court's hands.

I think that I would -- the only thing I would say as to the risk it creates, the government submits it's minimal because this case, your Honor -- it's no secret, and so we won't try to make it one, that the case against Mr. Durkin's client is based on the intercepts. If your Honor decides those intercepts aren't admissible, there isn't going to be a second trial. So it's -- there's not a risk here of there being trouble with perhaps your Honor making a decision in the trial that it's not admissible and then having to go through it all over again. We think it can take place.

We will put forth a detailed trial memorandum that

addresses in detail the order of proof, addresses in detail the evidence, and it will give the Court plenty of information to allow it, as the Court -- as the trial unfolds to make the determinations in the ordinary course.

MR. DURKIN: Judge, if I could just on that briefly, the issue of the admissibility of the tape is a totally separate issue as the admissibility of other co-conspirator declarations that by definition they're going to have to introduce against my client to prove the membership in the conspiracy. I mean, this is -- I mean, there are very few tapes that my guy is on; there are some, but I don't think under any stretch of the imagination those tapes on their own are going to be able to show his knowing and intentional membership in this particular conspiracy that they have articulated and that the grand jury returned the indictment on.

THE COURT: Okay. All right. I think I understand your position, Mr. Durkin. You've got a Rule 14 motion for severance.

MR. DURKIN: I stand on the pleadings on that.

THE COURT: Okay. Mr. Cole or Ms. Han, anything on that?

MS. HAN: No, your Honor. We'd also submit.

THE COURT: All right. And there's a motion for stay. Anything further on that, Mister --

MR. DURKIN: Well, to --

THE COURT: -- Durkin?

MR. DURKIN: -- the extent that it could also be interpreted as a motion to continue the trial date, I think it would be relevant. I think --

THE COURT: Was that the spirit you brought it in? I mean is that --

MR. DURKIN: Well, the spirit --

THE COURT: -- what you're requesting?

MR. DURKIN: -- that I brought it in, Judge, to be perfectly frank, was based on the pleading that I had attached as an exhibit in the other case in Virginia. That was a motion to dismiss, and I did not think a motion to dismiss was appropriate here, but I did think that under the circumstances a motion to stay might be the appropriate remedy. I think it is -- I know the government has suggested in its papers that somehow all the conduct took place here, so really what does it matter over there and so forth. But in the same breath, Mr. Cole just got up here and talked about the rock star Ayrow being connected to al-Qaeda and what could be coming into evidence.

I don't think there's any possible question that we have -- we have an obligation to investigate in Somalia. I offered to propose in camera to you what some of the specifics are; the government faulted me for not raising

that. We have -- we have all sat down and discussed that issue. There are probably six to eight material issues that we could relate to you on that. But I certainly tell you in good faith and I think everybody sitting here would also tell you as officers of the Court that we believe in our professional opinion that we need to, as -- in order to fulfill our defense function for these clients, we need to investigate in Somalia.

Now, it is conceivable, as Mr. Cole points out, that we might well be able to get some material witnesses to come out of Somalia, but like many things in this case, even the simplest thing somehow, when there's a connection to Somalia, seems to take even longer. It takes longer to connect phone calls to there, takes longer for people to get back to you. There's just a tremendous amount of lag time.

We do have some people -- we'd be happy to talk to you about it in camera -- that we have talked to over there. We have some -- we have some people that conceivably could travel out of there, but that's a whole 'nother can of worms, getting permission to even travel out of there in the midst of the -- whatever you want to call it, civil war or war that's going on there.

So it's just -- it's a real problem, and I just don't think in good conscience I could sit back and tell you that I could be prepared to try this case without at least

making a better effort in getting and seeing if some of the results that we've begun to put in place are going to come to fruition.

THE COURT: Well, okay. It's -- this is a little bit of a gauzy request at this point, Mr. Durkin. It arises in the context of a motion for stay; as you point out, it may spill over into the request that one or more of you may be making for a continuance of the trial; then again you're also referring to meeting with the Court in some kind of an ex-parte manner. That suggestion has been made earlier by other defense counsel for different purposes.

I would say that any request that you may have to meet with the Court to have the Court review materials or to have the Court consider any other requests should be put in the form of a motion/ex-parte application so that at least I know what to -- what I'm looking at here rather than just getting together with defense counsel for some amorphous discussion. I'd want to know exactly what the requests are and what the ultimate request is obviously in terms of a meeting, and then I think it should be buttressed, any specific requests should be buttressed by the who, what, when, where, and how of what you're requesting. For example, this case has been pending for quite some period of time.

With respect to this particular request, Mr. Durkin, I'd want to know what investigative efforts you've

undertaken to -- up to this point in time to travel to Somalia, who you're talking about, why this hasn't happened earlier, why all of a sudden we are on the eve of trial here, relatively speaking, and now this request is being made and why it could not have been made at an earlier point in time. Those are the things I think that ought to be addressed in a motion. Your motion may be -- or your application may be very well taken, I don't know, but until I have an opportunity to really assess what you're discussing here, what you're specifically requesting, it's difficult to react.

So what I'm going to do is I'm just going to defer any ruling on a motion for stay. Obviously I'm going to hear whatever you have to say today with respect to the -- to the viability of the date that we currently have for trial, and then after hearing what the positions of the parties are on that issue, the motion for stay may or may not be moot. We'll see. Okay.

MR. DURKIN: That's fine.

THE COURT: All right. Then we have a motion for release on conditions, and I'm going to ask respectfully that you take up any such matter with the magistrate judge, Judge Adler.

MR. DURKIN: Judge, just so you understand, the only reason I did it this way is that I thought it dovetailed into my first motion for a stay. I wasn't trying to impose

more work on you, but I thought it might be --

THE COURT: Okay.

MR. DURKIN: -- I thought that hearing might be relevant to the other motion.

THE COURT: Okay. Understood.

MR. DURKIN: What I would ask, Judge, if you would on that, could we just enter and continue this motion along with the other motion?

THE COURT: Oh, sure. The motion for release?

MR. DURKIN: Yes.

THE COURT: Okay. We'll just defer ruling on that --

MR. DURKIN: I don't know --

THE COURT: -- today.

MR. DURKIN: -- that I want to raise -- depending on the outcome of the first, the motion for a stay, it might affect my position on that.

THE COURT: Okay. Very good. Very good. So I think that handles all of the motions, the defense motions before the Court from the four different defendants here.

MR. DURKIN: There were several motions I had filed, Judge, and I think some of the other defendants did, about motions for an extension of time to file additional pretrial motions.

THE COURT: Yeah, and of course, those are always

granted.

MR. DURKIN: Okay. That's good.

THE COURT: We just never close the courthouse doors to any additional motions. But what I'm going to do with these matters before we discuss timing now is take all of these matters under submission and issue a ruling -- hopefully it will be out soon -- on the matters that can be ruled upon at this point in time, and then I'll be deferring on other motions.

MR. DURKIN: All right.

THE COURT: Thank you, Mr. Durkin.

MR. COLE: Your Honor --

THE COURT: Mr. Cole?

MR. COLE: -- the only thing I wanted to mention that I failed to -- after the reply briefs came in, I was going to let the Court know about some sort of supplemental note before filing it with the Court, but the Shipman case out of the Eastern District of Virginia, which I believe was the one that was attached as an exhibit to Mister -- the motions filed by Mr. Durkin on the issue of the stay --

THE COURT: Yes.

MR. COLE: -- the Court denied that. That happened after the issue was briefed by all the parties, and I just wanted to let the Court know that that Court out on the East Coast denied that motion for a stay --

THE COURT: All right.

MR. COLE: -- for dismissal.

THE COURT: All right. Okay. Then have we reached the point where we can discuss the trial date? Apparently one or more of you wanted to be heard on that. Mr. Durkin?

MR. DURKIN: Well, I was going to ask maybe could we have five minutes to --

THE COURT: Would you like a brief recess? All right. Why don't we take -- all right. Why don't we take -- we've been at it over an hour and a half now. Let's take a 15-minute recess. How's that? Okay.

(There was a break in the proceedings.)

THE COURT: Okay. Please be seated, ladies and gentlemen. Thank you. I just been advised that Mr. Mohamed Mohamud briefly fainted in the back. The medics are en route or they've already arrived. He seems to be fine. He's not here obviously. Ms. Moreno, if you'd like to take some time at this point, we can take some time, or because we have only scheduling matters I think going forward left, you can waive your client's presence. Nothing substantive will take place in his absence.

MS. MORENO: I can certainly waive my client's presence, your Honor. Is -- is he back there?

THE COURT: I think he is. Would you like to take an additional --

MS. MORENO: May I have --

THE COURT: All right. Then we'll take an additional five-minutes' recess and then resume. If someone can escort Ms. Moreno back to see how he's doing. Okay.

(There was a break in the proceedings.)

(Following is a sidebar conference.)

THE COURT: Okay. You indicated before we broke that you were going to waive his presence. We're just into scheduling at this point. We can resume that, as you said, in just a moment. If you do wish to see him, you can see him downstairs.

MS. MORENO: Thank you.

THE COURT: Maybe they can make an interview room available for you down there. Anything else that you're --

MS. MORENO: No.

THE COURT: -- or any other needs you may have with respect to your client?

MS. MORENO: Not with respect to my client, no. Thank you.

THE COURT: Okay. We just came off a 15-minute recess. I know you were probably all talking about -- well, were you talking about dates and so on and so forth?

MS. MORENO: Yes.

THE COURT: We can certainly resume in a more public setting. Are you together on a recommendation or

other issues that we need --

MR. COLE: We're together -- we're together on what date would work if it's continued. We'd prefer the trial to stay May 7, but we are together, if the Court decides to continue it, on a date that will work.

MR. DRATEL: I think just to give the questions of what we were discussing in terms of dates --

THE COURT: I think I'd rather do this -- with the community back there --

MR. DRATEL: That's fine.

THE COURT: -- I think it's probably better if they can hear everything that's happening, Mr. Dratel. Thank you.

(Sidebar conference concludes.)

THE COURT: Counsel, I'm glad to hear Mr. Mohamud is much better. He's resting now. He need not be brought back into the courtroom because we're dealing just with scheduling issues from this point; we can do this outside the presence of the proceedings. Ms. Moreno has kindly waived her client's appearance for this, and so we are able to discuss I think the last matter, which was the pending trial date. Mr. Dratel?

MR. DRATEL: Thank you, your Honor. And just an initial thought on it is that I think the Court was correct back when we set this date, set this schedule, that it might be too ambitious in the sense of what needed to be done and

the obstacles of doing it, and I think that's come to fruition unfortunately. And obviously it was our intention and interest in proceeding to a trial date just as quickly as we felt possible, but upon reflection and getting through what we need to get through, we are obviously very concerned about our ability to do that given the factors that I'm going to explain now.

And I think the case, as the government's acknowledged, begins fundamentally with the wiretap, and there are 1800 calls there, of which the government has provided I think 126 transcripts of calls. So that leaves a large number of calls that have not been transcribed. In addition, the government's 126 are not necessarily verbatim for the calls. There are pieces of those calls that are not transcribed that we have had to go back to as well to get a complete picture of the specific conversations.

The task of finding a court-certified -- meaning someone on whom we can rely on not only in terms of translating but also in terms of, if necessary, testimony so as not to duplicate this task -- but the task of finding someone proficient, sufficiently proficient, certified in the Somali language who was not already conflicted out of this case either by being in this community or through a rather significant work load with the government already, given the focus on al-Shabaab in the last year, year and a half, was

very difficult, much more difficult than we imagined. But we have now contracted with a sufficient number to do what needs to be done. But we have to start from scratch with a lot of those calls in terms of translation because they're in Somali, and obviously the lesser time-consuming task of verifying the government's transcripts and filling in the parts that the government has not transcribed, but it's -- I think the government alluded to it in the context of the suppression argument about how long it takes and how arduous a task it is to go through these conversations in a way that is comprehensive and makes sense to get a full appreciation of what's necessary. And as we go through our investigation, we have been able through meeting with our clients to identify conversations that we identify more and more as we become more knowledgeable about the case. So, for example, certain things that might have been evident to us at the very beginning as being relevant now, as we move forward and get deeper into the facts and the investigation of the case, other categories of conversations are becoming relevant and now we have to identify those with the help of our clients, get them to the interpreters. So it's a huge undertaking that will consume a lot of time.

And, in addition, what we heard today also is that the government may at some point be providing additional Jencks material with respect to conversations that, again,

will be subject to translation. And depending on when those are produced, obviously that's going to create a time problem as well. There just aren't enough people who are qualified to do this who are in a position to do it for us to do it any faster. And we've delegated among ourselves various tasks so as to be more efficient, to not duplicate, but this is a product of that. And as a part of that, as we go through these conversations and develop what's relevant and talk to our clients, questions of evidence and persons in Somalia become more apparent in terms of their need and the problems of access.

Just as an example, Mr. Ghappour was involved in trying to figure out whether security arrangements sufficient to give some -- not guarantee but at least some comfort level as far as security goes, that took weeks to find out what that would cost, and it's actually prohibitive given the resources here, and I don't know that it's going to be feasible to actually go to Somalia for any of us to do the kind of investigation that we need to do; we're still trying that. But we do have contacts within, and it's just extraordinarily difficult to make those contacts on a regular basis. It took weeks -- even with phone numbers and email addresses, it took weeks to get a phone call to someone who could get us in touch with someone. It took more weeks to then get in contact with the persons that we -- we've

identified probably three or four people, and we've been able to contact one. We're -- we have contact information for a couple more, but yet we're still trying. Sometimes you call and there are no networks available. You just don't get through. Email is -- Internet service is intermittent, sporadic, unreliable --

So I think -- we've had conversations, and there's at least certainly one witness that we've identified who we'd want to do Rule 15, I think a Rule 15 deposition, and they might -- I think that they could, if the logistics work out, they could come to either Kenya or perhaps Djibouti or Qatar; those are neighboring places in which this can be done. In Rule 15 depositions, obviously there's some logistical issues there too in terms of finding the right place and someone who could administer the oath. It can be done, but, again, these things take some time in getting together. And we think it's important in the case to do them. We're hoping to have more, maybe as many as three or four, as we reach the people who we've -- we're looking to reach, and this has been an ongoing process.

Another issue is the -- if there is classified litigation, it's going to take time for a couple of reasons, one of which is, just as a threshold matter, our ability to review the material would be limited to the secure facility that would be assigned to us -- I'm not sure if it's in the

courthouse or wherever it might be in San Diego -- that will limit us in terms of our ability to review. We'll have to do it onsite, it's time-consuming. Documents that we need to prepare in terms of motions -- Ms. Han referred to a Section 5 application that we might make to the Court for either a declassification or a substitution or some form of evidentiary form for certain classified discovery if we get it, those all have to be prepared on the computers in the classified -- in the secure room. And so the logistics of that are somewhat cumbersome and time-consuming as well.

We have done a significant amount of work, and -- but it just -- that -- the problem is just sort of projecting how much we'll accomplish before May 7 and how much more material we're going to get before May 7 that we're going to have to do -- and just the -- just the gross numbers, particularly in terms of the intercepts and getting them translated. It's just there's only so much people can do, the people who are translating this. And there's certain things that are within our control. You know, we've met our motion deadline. That is within our control, we can do that. There's just certain things that are out of our control. One is the volume of intercepts; another is obviously the fact of the language problem; and the third being the inaccessibility of Somalia on a regular basis, both in terms of communications and investigation. There are issues that we

need to investigate in Somalia that we -- I don't think -- just being practical, I don't think we're going to be able do ourselves; we're going to have to try to create a way in which -- and we're investigating that -- that we can do in some evidentiary fashion either through witnesses or some other way that our issues that are directly related to this case, which is where the money went and all of that kind of stuff.

THE COURT: I think you've covered the three basic areas you wanted to cover, counsel. And I assume you're speaking for everyone here, and --

MR. DRATEL: I think so. If anyone has anything they wish to add, I'd be certainly willing to --

THE COURT: If anyones does have anything they wish to add from the defense, you certainly may, on this request for a continuance of the trial date. Seeing no indications of anyone else wanting to speak. Mr. Cole, I haven't heard a specific request in terms of time, but perhaps you've had an opportunity to discuss that.

MR. DRATEL: You want -- are you asking me or Mr. Cole?

THE COURT: Either way.

MR. DRATEL: Oh, we thought we would need a couple of months. We were hoping for something in September, but two problems with September; there's a logistical problem

with the government in September, which we are willing to accommodate certainly, and there are also issues in September in terms of the Jewish holidays and things like that that tend to break it up anyway that might make September not the best. So we among our -- or from the defense came up with, based on some other scheduling issues, but came up with October 15, Monday, October 15 as our firm date.

THE COURT: Did you share that with Mr. Cole?

MR. DRATEL: Yes.

MR. COLE: Yes, your Honor. We're clear. That would work fine. We would like the trial to happen May 7. We think there's still several months for the parties to prepare, and so our preference would be to stick with the trial date we have, but that date that is proposed is open on the government's schedule.

THE COURT: What's the estimated length of trial, please, Mr. Cole, from your perspective?

MR. COLE: I think the government's case would be a week or a week and a half. What I can't predict entirely is the cross by four defense attorneys, so that's sort of a wild card. Our evidence itself is not particularly lengthy. I would think about a week and a half --

THE COURT: Five --

MR. COLE: -- for the case-in-chief.

THE COURT: Five to seven days --

MR. COLE: Yes.

THE COURT: -- for a case-in-chief?

MR. COLE: Right, once the jury is sitting.

THE COURT: Mr. Dratel, you probably can't come up with too fine an estimate for the defense, but if we were to double the government's estimate for its case for a total of the entire case, do you think that would be realistic at this point?

MR. DRATEL: Yes, I think that that would certainly be the maximum would be a -- you know, another -- my guess would just be somewhere between three and seven days.

THE COURT: So we're looking at 10 to 15 days, total, no more than that from what I'm hearing, which would be two to three weeks or thereabouts. All right. As I understand it, Mr. Cole, you're not opposing this motion, you wish you could proceed on the 7th, but I think under the circumstances you are probably understanding that the request is reasonable for the reasons proffered by counsel?

MR. COLE: Yes, your Honor.

THE COURT: Okay.

MR. DRATEL: And, your Honor, just due to the nature of the case, just -- I don't know if the Court's looking -- you know, in terms of looking at the Court's calendar, probably additional time for jury selection more than ordinary just because of the --

THE COURT: Oh, I understand that. No, I'm aware of what might be needed in that area. Okay. You seem to have worked pretty carefully in working out what your estimate is and securing a date that's convenient for all parties. I assume that the date of October 15, which is a Monday, is convenient for everyone. All defense attorneys have bought into that date so that we don't need to deal with any issues of availability or scheduling down the line; is that correct?

MR. DURKIN: That's right, Judge.

THE COURT: Ms. Moreno?

MS. MORENO: Yes, your Honor.

THE COURT: Mr. Ghappour?

MR. GHAPPOUR: Yes, your Honor.

THE COURT: Okay. Everybody's indicating that October 15 is a viable date for them. All right. What we'll do at this point then is I'll grant the request for a continuance; this is a request made by all defense counsel and for good cause and for the reasons stated by Mr. Dratel, I would find that the approximate five-month continuance is necessary and reasonable for the defense to continue and complete its preparation in this case, including receiving additional material from the government, if anything is to be provided, to finishing all of the translations that it currently is aware of and any additional translations that

may need to be translated, and also to make the necessary witness contacts earlier alluded to by Mr. Dratel.

What I am going to do, however, is order Mr. Cole -- and, Mr. Cole, I do appreciate your willingness to make these materials available to the Court, these CIPA materials, as soon as possible. You've indicated February 17 --

MR. COLE: Yes, your Honor.

THE COURT: -- as a viable date, so I will request that you provide those materials to the Court no later than February 17, and that will allow me to begin my work under CIPA. And was there anything else that you needed to address at this point, Mr. Cole?

MR. COLE: No, your Honor.

THE COURT: Okay. Mister --

MR. DRATEL: No, your Honor.

THE COURT: -- Dratel? Any other defense counsel need to be heard? Ms. Moreno?

MS. MORENO: With respect to the attendant dates and motions in limine --

THE COURT: Well, I'm going to -- yes. Well, go ahead. I was going to address that before we --

MS. MORENO: I would just suggest that those dates are also pushed over because as we continue our investigation and our translations, they inform our motions in limine.

Additionally, I would ask the Court what is the Court's pleasure with respect to jury questionnaires and voir dire? I'm unfamiliar with your Honor's process.

THE COURT: Okay. Well, we'll certainly cover those things the closer we get to a trial date, and if anyone is requesting a jury questionnaire, I'll be happy to consider anything that ultimately will be provided for my review, and then we'll address those closer to the time of trial; I would think that would be appropriate.

The motion to stay earlier made by Mr. Durkin will be -- I think that's mooted at this point, Mr. Durkin, in light of what the Court has just done.

MR. DURKIN: I think it's temporarily mooted if you would --

THE COURT: Yes.

MR. DURKIN: I would prefer, if it's okay with the Court, to just enter a continuance.

THE COURT: Right. It's taken off calendar, however, at this point.

MR. DURKIN: That's fine.

THE COURT: You can renotice it at any time.

MR. DURKIN: That's fine.

THE COURT: There was a motion for release as well. I think that can be taken off calendar --

MR. DURKIN: Just ask the same thing with that.

THE COURT: All right. So those two motions then, the motion to stay, the motion for release on conditions, would be taken off calendar subject to being renoticed upon the request of counsel.

MR. DURKIN: Thank you.

THE COURT: All right. And what I'm anticipating at this point would be to set a further status conference -- not a motion hearing date but a status conference -- approximately 60 days out, as we've done early on in the case, just to monitor the progress of the case, to address any issues that need to be addressed, and to make sure that we're doing everything we can to now keep this new date of October 15 as a trial date viable. So I'm looking at a status date approximately, as I say, two months out. Have any of you discussed any of that? I assume not. We're looking at I would say April -- we can do this on a Friday I would think, April 6 in the afternoon or April 20 in the afternoon.

MR. COLE: Either one works for the -- we had an April 5 date that we could convert to a status conference unless the Court wants to do it on a Friday, and then --

THE COURT: You have April 5 date?

MR. COLE: That was for motions in limine. And we could convert that as one of --

THE COURT: Yes, I see that. Either way. I can do

it on the 5th -- we can do it on the 5th; that way we can spend a little more time. So your pending date of April 5 at 9 a.m. will remain as a status conference date. At that point we'll make further arrangements for further dates to be set. The date of May 7 for trial is vacated at this point. Your pending motions -- all pending motions not ruled upon earlier than April 5 will be continued, including the discovery motions. As a result, the Speedy Trial Act is tolled between today and April 5 at 9 a.m. Anything further, counsel?

MR. DRATEL: Not from us, your Honor.

THE COURT: All right. Very well. We'll be in recess on this matter.

(The proceedings were concluded.)

Certificate of Reporter

I hereby certify that I am a duly appointed, qualified, and acting Official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the mentioned cause on the date or dates listed on the title page of the transcript; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated August 10, 2012 at San Diego, California.

Debra M. Henson

/s/ Debra M. Henson (electronic)
Debra M. Henson
Official Court Reporter